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# Mr. Justice Whittaker: The Man on the Right Supreme Court History Project: The Warren Court 1957-1961: Project

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## MR. JUSTICE WHITTAKER: THE MAN ON THE RIGHT

### INTRODUCTION

The Supreme Court under Chief Justice Earl Warren constituted one of the most controversial Courts in United States history. From 1956 to 1961 the so-called "liberal bloc" of the Court was composed of the Chief Justice and Justices Hugo Black, William Douglas, and William Brennan. The "conservative bloc" initially consisted of Justices Felix Frankfurter, Harold Burton, John Harlan and Charles Whittaker, who had replaced Stanley Reed in early 1957. Justice Burton retired at the beginning of the 1958 term and was replaced by Potter Stewart. Stewart and the remaining Justice, Tom Clark, had conservative leanings.<sup>1</sup> Whittaker served four full terms, 1957-60, and two partial terms, 1956 and 1961.

While those who write about the Court find it convenient to speak in terms of "blocs," it cannot be assumed that "the number, size, composition and cohesion tendencies of blocs of justices are constant."<sup>2</sup> A study of the cases during this period shows that Justice Whittaker disagreed with his colleagues in the "conservative bloc" in a significant number of cases. This comment focuses specifically on those cases where Whittaker disagreed with either Frankfurter or Harlan (or both). The object is to see if areas of disagreement or philosophical differences are evident from the cases.

The selected cases were read and categorized. Certain cases were not considered: those in which there was not a full review, those in which an opinion was not written, and per curiam opinions.<sup>3</sup> In those cases which overlapped, particular effort was made to place the case in the category which best reflected the area of disagreement between Whittaker and the other two justices.<sup>4</sup>

An analysis was made of the cases in each category to determine if there were major areas of disagreement or basic philosophical differences. Emphasis was given to cases with

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1. P. JACKSON, *DISSENT IN THE SUPREME COURT*, 502-04 (1969).

2. Ulmer, *The Analysis of Behavior Patterns on the United States Supreme Court*, 22 J. OF POL. 629, 633 (1960).

3. This is in keeping with the method followed in other Supreme Court History Project articles.

4. See app. A, *infra*.

opinions by Whittaker, whether majority, concurring, or dissenting.

Over a period of five years Whittaker's average disagreement rate with Frankfurter was 21.15%; with Harlan it was 21.12%. The cases in which disagreement was the greatest occurred in the area of labor relations (where Whittaker was more conservative), and criminal procedure (where Whittaker was more liberal). The other categories classified were: 1) government regulation; 2) federal and state taxation; 3) civil procedure; 4) political freedom and citizenship; and, 5) constitutional issues. Although the disagreement rates were measurable, they do not seem to have emerged from any basic philosophical differences among Frankfurter, Harlan and Whittaker.

The first section of this comment looks at the background and career of Whittaker and briefly discusses his voting pattern. In the second section certain categories of cases are considered according to the issues of disagreement. The final section considers Whittaker's performance as a Supreme Court Justice.

#### WHITTAKER-THE MAN

##### *Early Life and Education*

Charles Evans Whittaker was born on his father's farm near Troy, Kansas, on February 22, 1901. He attended the local school through ninth grade and then attended high school for approximately one and a half years. Following the death of his mother in 1917, Whittaker quit high school.<sup>5</sup>

During his youth he had supplemented the family income by trapping small animals, such as skunks, for their pelts and by hunting game. He continued these activities and worked on his father's farm from 1917 to 1920, saving money to continue his education. In 1920 Whittaker went to Kansas City, Missouri, to enroll at Kansas City School of Law (now the University of Kansas City School of Law). His application was originally rejected due to his failure to complete high school. He managed to convince university officials to let him take law school classes while being tutored in any subjects necessary to

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5. *Nomination of Charles E. Whittaker to be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Committee on the Judiciary*, 85th Cong., 1st Sess. 32 (1957) [hereinafter cited as *Hearings*].

complete his high school education.<sup>6</sup>

During the day Whittaker worked as an office boy and messenger for the law firm of Watson, Gage & Ess. Three nights a week he attended law school; the other two nights he studied high school subjects with private tutors. He completed law school and high school in 1924; he had passed the Missouri state bar examination in 1923, while still in school.<sup>7</sup>

### *The Lawyer*

Upon graduating from law school, Whittaker joined Watson, Gage & Ess. He remained with the firm for thirty years, becoming a junior partner in 1928 and a full partner in 1932. At that time the firm became known as Watson, Ess, Whittaker, Marshall & Engass.<sup>8</sup>

The firm, one of the largest law firms in Missouri, handled many large corporate clients in the Kansas City area. These included Union Pacific and Southern Pacific Railroads, Montgomery Ward, City National Bank & Trust Company, Kansas City Public Service, Minneapolis-Moline, and the *Kansas City Star*. Whittaker was a litigation partner in the firm from 1928 to 1942. He then limited his trial work, concentrating instead on office counseling, financial advising, and representation of banks.<sup>9</sup> His reputation was that of an outstanding trial and appellate attorney: a "lawyer's lawyer".<sup>10</sup>

Whittaker became involved in bar association activities, eventually becoming president of the Missouri State Bar Association in 1953. Although he was not active in politics he became well known to state Republican leaders both as a successful lawyer and as the head of the state bar association.<sup>11</sup>

### *The Judge*

In 1954 a vacancy arose on the United States District Court for the Western District of Missouri. Herbert Brownell, then Attorney General, canvassed local political, labor, and bar leaders concerning possible candidates. Whittaker's name was

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6. L. Friedman, *Charles Whittaker*, in *THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969*, at 2894 (L. Friedman and F. Israel eds. 1969).

7. *Id.*

8. *Hearings*, *supra* note 5, at 34 (statement of Charles E. Whittaker).

9. *Id.*

10. *Id.* at 1 (statement of Stuart Symington).

11. *New York Times*, March 3, 1957, at 1, col. 1.

enthusiastically suggested. President Eisenhower's brother Arthur, a Kansas City banker and close friend of Whittaker's, Roy Roberts, Republican publisher of the *Kansas City Star*, and Harry Darby and Frank Carlson, Republican Senators from Kansas, also pushed for Whittaker's nomination.<sup>12</sup> Impressed, Brownell recommended the appointment. President Eisenhower nominated him and the Senate rapidly confirmed the nomination. Whittaker assumed his first judicial position on July 6, 1954.<sup>13</sup>

As a federal district court judge, Whittaker rapidly cleared the dockets of the case backlog which had developed prior to his appointment. Forty-seven of his opinions were published; thirty-three were of a procedural nature and the remainder concerned various civil matters and a few criminal cases.<sup>14</sup>

Two years later, in June, 1956, Whittaker was appointed to a vacancy on the Eighth Circuit Court of Appeals. He sat on that court for eight months. During this time he continued to impress his fellow judges with his efficiency and hard work. As an appellate judge, Whittaker wrote eleven opinions and one dissenting opinion. Eight of these were Tax Court appeals; three others involved government regulations and agencies.<sup>15</sup>

### *The Justice*

In early 1957 Justice Reed announced his retirement. President Eisenhower had established certain criteria for nomination to the Supreme Court: (1) character and ability that could command respect and confidence; (2) a basic philosophy of moderate progressivism, common sense, and high ideals; (3) prior judicial service; (4) geographic balance; (5) religious balance; (6) an upper age limit of sixty-two; (7) a thorough F.B.I. check of the candidate and his approval by the American Bar Association.<sup>16</sup>

Whittaker met all these criteria. He had a record as an outstanding corporate lawyer and was a conservative Republican, but had tried genuinely to be non-partisan in his public and private careers. He had enthusiastic backing from the bench, the bar, and the local Republican political leaders. In

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12. H. ABRAHAM, *JUSTICES AND PRESIDENTS*, 248 (1974).

13. Friedman, *supra* note 6, at 2895.

14. Volz, *Mr. Justice Whittaker*, 33 NOTRE DAME LAW. 159, 168-69 (1958).

15. *Id.* at 169.

16. ABRAHAM, *supra* note 12, at 235.

addition, Whittaker was from a mid-central state (as Justice Reed had been), was a Methodist, and was only fifty-six. On strong recommendations the President nominated Whittaker as an Associate Justice on March 2, 1957.<sup>17</sup>

Senate confirmation hearings were held on March 18. The only party to oppose Whittaker's nomination was Fyke Farmer, who objected to the nominee because of a decision he had rendered as a federal district court judge.<sup>18</sup> The Judiciary Committee paid little attention to Farmer's protests.<sup>19</sup> The Committee unanimously recommended confirmation, which occurred on March 19.<sup>20</sup> Whittaker was commissioned three days later and took his seat on March 25.<sup>21</sup>

Whittaker aligned himself with the conservatives on the Court, although he did not always vote with the Frankfurter-Harlan group. On April 1, 1962, after only five years, he retired mentally and physically exhausted from his work on the Court. Whittaker resigned his commission as an Associate Justice September 30, 1965.<sup>22</sup>

#### VOTING PATTERNS: WHITTAKER AND THE CONSERVATIVE BLOC

##### *Labor Relations*

There were more instances of disagreement between Whittaker and Frankfurter and Harlan in the area of labor relations than in any other area.<sup>23</sup> The cases dealt with the construction and application of various Congressional statutes. Whittaker's position was more restrictive of the rights of labor than were those of Frankfurter and Harlan.

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17. *Id.* at 247-48.

18. *Davis v. University of Kansas City*, 129 F. Supp. 716 (W.D. Mo. 1955). Farmer, an attorney, had represented Horace B. Davis, a professor who had been fired for refusing to answer questions posed to him by the Senate Internal Security Subcommittee and the University trustees concerning his possible affiliation with the Communist Party. Davis brought suit claiming he had tenure and could be fired for "adequate cause" only. He maintained refusal to answer was not "adequate cause." Whittaker dismissed his complaint, finding refusal to answer did constitute "adequate cause."

19. *Hearings*, *supra* note 5, at 5-31 (testimony of Fyke Farmer).

20. Whittaker's treatment before the Judiciary Committee was much gentler than that given the three previous Eisenhower nominees—Warren, Harlan and Brennan. L. KATCHER, *EARL WARREN*, 362 (1967).

21. 353 U.S. IX-XI (1957).

22. *New York Times*, Nov. 27, 1973, at 44, col. 1. Whittaker did not participate in public life to any significant degree. He did not sit as a federal judge after retiring. He died November 26, 1973, in Kansas City.

23. See app. A, *infra*.

*The Power of the NLRB.* Illustrative are a number of cases concerning the powers of the National Labor Relations Board (Board) to take affirmative action to effectuate the policies of the National Labor Relations Act (Act).<sup>24</sup> Douglas wrote all the majority opinions;<sup>25</sup> Whittaker dissented to all of them. Harlan joined the majority. Frankfurter did not participate.

*Local 60, United Brotherhood of Carpenters v. NLRB*<sup>26</sup> concerned an order of the Board directing a union to refund employee dues and work permit fees collected under an illegal closed-shop hiring arrangement.<sup>27</sup> The Court found the Board had no power to order the refund in the absence of evidence that membership in the union was "influenced or compelled by reason of unfair labor practices."<sup>28</sup>

Harlan, in his concurring opinion, thought the Board should be denied the use of dues-reimbursement relief in situations of imputed coercion. He felt it was "not unlikely that a substantial number of employees were willing to pay dues for union membership" and there was "no rational relationship between the amount of dues paid and the value an employee who is willing to join a union would place on his [statutory] freedom to change his mind."<sup>29</sup>

Whittaker dissented. He deferred to the Board's expertise, arguing that, even in the absence of specific proof of injury to all employees, the Board could conclude that full restitution by the union of dues collected under an illegal arrangement was necessary to effectuate the policies of the Act. Despite the ban on closed-shop practices, such arrangements still flourished. The Board had concluded that something more effective than a cease and desist order was needed and had imposed the reimbursement requirement. Whittaker thought this was clearly within the Board's powers. The order was not a "penalty" which the Board had no power to assess, but rather a permissible method of depriving the union of advantages gained from subverting the Act.<sup>30</sup>

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24. 29 U.S.C. §§ 151-169 (1976).

25. *International Typographical Union v. NLRB*, 365 U.S. 705 (1961); *NLRB v. News Syndicate Co.*, 365 U.S. 695 (1961); *Local 357, Int'l Bhd. of Teamsters v. NLRB*, 365 U.S. 667 (1961); *Local 60, United Bhd. of Carpenters v. NLRB*, 365 U.S. 651 (1961).

26. 365 U.S. 651 (1961).

27. Closed-shop hiring clauses require membership in a union before the employee can obtain employment.

28. 365 U.S. at 655.

29. *Id.* at 659-60 (concurring opinion).

30. *Id.* at 662-77 (dissenting opinion).

Whittaker adopted the same rationale in other cases in which he supported the Board's power to require reimbursement of dues and assessments. *Local 357, International Brotherhood of Teamsters v. NLRB*<sup>31</sup> involved an agreement between the union and an employer that required the employer to hire temporary employees only if referred through a union hiring hall. The Board found this arrangement illegal *per se* and ordered reimbursement of fees and dues paid by all temporary employees to the union.<sup>32</sup>

The majority, Harlan concurring, set aside the reimbursement order and held that the agreement was not illegal *per se* since it provided that there be no discrimination against temporary employees because of the presence or absence of union membership. The Act was violated only when discrimination was, in fact, practiced against non-union members.<sup>33</sup> As Harlan said, "a mere showing of foreseeable encouragement of union status [was] not sufficient basis for finding a violation."<sup>34</sup>

*The Injunctive Power of the Federal Courts.* Another series of cases dealt with the extent to which the Norris-Laguardia Act<sup>35</sup> limited the power of federal courts to issue injunctions in labor disputes.<sup>36</sup> The majority, including Harlan and sometimes Frankfurter, gave a broad reading to the anti-injunction provisions of this act. In *Order of R.R. Telegraphers v. Chicago & N.W. Railway*,<sup>37</sup> the railroad had submitted plans to state public utility commissions to abolish certain unnecessary stations and positions. The union threatened a railroad strike to enforce its demand that the current bargaining agreement between the railroad and the union be amended so that none of the jobs could be abolished without the consent of the union. Black, writing for the majority, held that the controversy related to an effort on the part of the union to change the "terms" of an existing collective bargaining agreement; the matter was clearly within "conditions of employment"—hence the strike could not be enjoined.<sup>38</sup>

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31. 365 U.S. 667 (1961).

32. *Id.* at 668-70.

33. *Id.* at 676-77.

34. *Id.* at 679 (concurring opinion).

35. 29 U.S.C. §§ 101-115 (1970).

36. A lawful labor dispute under § 113(c) to the Act included any controversy concerning terms or conditions of employment; union and management were required to bargain concerning these items.

37. 362 U.S. 330 (1960), *rehearing denied*, 362 U.S. 984 (1960).

38. *Id.* at 336.



Whittaker, dissenting, maintained that the union's demand did not relate to rates of compensation or working conditions. He believed Congress had declared its labor policy in several related acts, which had to be read together as an integrated plan of regulation. He found that the union's demand was not a lawfully bargainable subject under the Railway Labor Act because it was opposed to the policies of the Interstate Commerce Act. Thus it was exempted from the Norris-Laguardia Act's prohibition on injunctions.<sup>39</sup>

Whittaker was more inclined to find that the controversies in the cases did not constitute a lawful labor dispute within the meaning of the Act.<sup>40</sup> His position would have allowed district courts broad discretionary powers in enjoining strikes.

His position against restricting the power of the district courts in the area of labor relations is also seen in his majority opinion in *Leedom v. Kyne*.<sup>41</sup> The Board had failed to take a vote of professional employees in determining whether or not certain non-professional employees should be included with them in a collective bargaining unit. Section 9(b)(1) of the National Labor Relations Act<sup>42</sup> required approval of the inclusion by a majority of the professionals. The employees association asked the Board to amend its decision. The Board refused and conducted a representation election. After the election the association brought suit in district court to set aside the Board's determination of the bargaining unit and the election. The Board contended that the district court lacked jurisdiction.

In his opinion Whittaker noted that the district court would have jurisdiction under § 24 (8) of the Judicial Code<sup>43</sup> unless the review provisions of the National Labor Relations Act destroyed it. The suit, he said, was "not one to 'review' . . . a decision of the Board made within its jurisdiction. Rather it [was] one to strike down an order of the Board made in excess of its delegated powers . . . ."<sup>44</sup> The attempted exercise of power deprived professional employees of a right granted by

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39. *Id.* at 352-59 (dissenting opinion).

40. See *Marine Cooks & Stewards v. Panama S.S. Co.* 362 U.S. 365 (1960), *rehearing denied*, 363 U.S. 809 (1960). Whittaker was the lone dissenter; he based his argument on the rationale he developed in *Order of R.R. Telegraphers*.

41. 358 U.S. 184 (1958).

42. 29 U.S.C. § 159 (1976).

43. 28 U.S.C. § 1337 (1976).

44. 358 U.S. at 188.

Congress; the federal district courts had jurisdiction to prevent a deprivation of such a right.

Frankfurter joined Brennan in dissent. They asserted that under the Act judicial review was limited to courts of appeal after the Board had ordered an employer to do something based on election results. They feared that under the majority position the tactic of litigation could be used to delay the initiation of collective bargaining.<sup>45</sup>

*Employee Injury Cases.* Another area of concern to the Court was employee injury cases arising under various federal statutes. Whittaker was less inclined than Frankfurter or Harlan to interpret basic policy questions in favor of the injured employee.

This position can be seen in *Still v. Norfolk and Western Railway*.<sup>46</sup> Still sued the railroad under the Federal Employers' Liability Act (FELA),<sup>47</sup> claiming he received back injuries at work as a result of negligent conduct by his fellow employees. Still had made fraudulent misrepresentations about his health at the time he had been hired and the railroad had relied on these in hiring him. A question arose as to whether the railroad could escape liability under FELA by proving this.

Harlan joined the majority in holding that, even though he could be terminated for the fraud, the plaintiff was an employee under FELA and therefore could recover.<sup>48</sup> The Court limited to its precise facts *Minneapolis, St. Paul & Sault Ste. Marie Railway v. Rock*,<sup>49</sup> which seemed to bar recovery, and ordered a new trial.

Frankfurter concurred because he thought the question of fraud in obtaining employment should not have been withdrawn from the jury.<sup>50</sup>

Whittaker dissented in strong terms:

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45. *Id.* at 192 (dissenting opinion).

46. 368 U.S. 35 (1961). *See also* *Alaska Ind. Bd. v. Chugach Elec. Ass'n*, 365 U.S. 320 (1958).

47. 45 U.S.C. §§ 51-60 (1976). FELA required the railroad to pay damages for injuries negligently inflicted on their employees.

48. 368 U.S. at 44-45.

49. 279 U.S. 410, 414-15 (1929). *Rock* held that an employee who obtained employment by having someone else impersonate him at a required pre-employment physical examination could not recover under the Act for personal injuries sustained during employment despite the fact that his physical condition had not caused the injuries.

50. 368 U.S. at 47 (concurring opinion).

The question is whether, despite his flagrant fraud, in procuring the employee status, he may have the special benefits, and freedom from the normal defenses, given by Congress in the Federal Employers' Liability Act to one who has honestly acquired the status of and is truly an employee of a railroad. I think Congress did not intend to give those special benefits to a person who has acquired a putative employment relationship with a railroad by flagrant fraud, whether that fraud falls within the "precise facts" of the *Rock* case or within any of the myriad variations thereof.<sup>51</sup>

Whittaker could not agree to a repudiation of the principle "that fraud in the inducement of a contract vitiates the contract."<sup>52</sup>

*Specific Performance of Arbitration Clauses.* Three related cases—*Textile Workers v. Lincoln Mills*,<sup>53</sup> *General Electric Co. v. Local 205, Electrical Workers*,<sup>54</sup> and *Goodall-Sanford v. Textile Workers*<sup>55</sup>—involved suits brought by labor unions seeking specific performance of arbitration provisions in collective bargaining agreements. These cases show a clear difference in approach among the three justices.

Whittaker joined the majority opinions by Douglas. The Court held that section 301 of the Labor Management Relations Act of 1947 (LMRA)<sup>56</sup> was not merely jurisdictional but authorized federal courts to fashion a body of federal law for the enforcement of collective bargaining agreements. This included authority to grant specific performance of arbitration provisions contained in such agreements.<sup>57</sup>

Harlan joined Burton in concurring in the result. However, they interpreted section 301 as giving the federal courts protective jurisdiction only. This interpretation permitted the application of federal remedial law, but required the applicable sub-

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51. *Id.* at 49 (dissenting opinion).

52. *Id.*

53. 353 U.S. 448 (1957).

54. 353 U.S. 547 (1957).

55. 353 U.S. 550 (1957).

56. Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a) (1970). Section 301(a) provides in part that suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy.

57. 353 U.S. at 445-59.

stantive law to be state law.<sup>58</sup>

Frankfurter dissented. He said Congress had not intended specific enforcement of such arbitration clauses. Section 301 was jurisdictional only; the law to be applied was solely state law. According to Frankfurter any attempt to grant federal courts jurisdiction over contracts arising under state substantive law was unconstitutional.<sup>59</sup>

In the field of labor relations, there appears to be a discernible pattern in Justice Whittaker's voting behavior that placed him to the right of his fellow conservatives, Frankfurter and Harlan. His votes against labor unions and for the Board or the courts placed him in disagreement with his bloc in a greater percentage of the cases than in most other areas.

### *Federal and State Taxation*

Cases involving federal and state taxation produced another area of major disagreement between Frankfurter, Harlan, and Whittaker.<sup>60</sup> Whittaker seemed more willing than the other two Justices to vote against the governmental body imposing the tax.

*State Taxes.* Whittaker wrote the majority opinion in *Youngstown Sheet & Tube Co. v. Bowers*.<sup>61</sup> The issue was whether certain imported goods had lost their distinctive character as imports, removing their immunity from state taxation under the import-export clause of the Constitution.<sup>62</sup> The goods—iron ore and wood veneer and lumber—were stored by the manufacturers in their original packaging or form.

The majority focused on whether the manufacturers had acted upon the imported materials by irrevocably committing them to use in manufacturing at the plant. The Court emphasized that the goods were imported to supply, and were essential to, the manufacturer's current operating needs. Indiscriminate portions of the goods actually were being used to supply daily operating needs. They were thus part of the manufacturing process and had lost the tax immunity of an import. Because the goods were being put to the use for which they were

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58. *Id.* at 460 (concurring opinion).

59. *Id.* at 461-84 (dissenting opinion).

60. See app. A, *infra*.

61. 358 U.S. 534 (1959).

62. U.S. CONST. art. I, § 10, cl. 2 reads in part, "No state shall, without the consent of Congress, lay any imposts or duties on imports or exports . . . ."

imported, the fact that they remained in their "original packages" was immaterial.<sup>63</sup>

Frankfurter and Harlan disagreed. For them the key fact was that the goods were still in the original package or form, and were clearly identifiable. Most imports, they said, were committed for use in manufacture. To say that the goods were actually being used to supply daily requirements meant only that the imports were awaiting their intended, but not yet begun, manufacturing process. They maintained such goods were still imports, immune from state taxation.<sup>64</sup>

Whittaker's position in *Youngstown*, supporting state taxation of business, was not typical of his general attitude on state taxation. More representative are three cases concerning state taxes levied on federal property being used by, or in the possession of, private parties. The majority in each case found that the tax did not infringe on the federal government's immunity from state taxation. Whittaker dissented in each case, finding the tax unconstitutional because it was laid on the property of the government.

Frankfurter and Harlan agreed with Whittaker in *City of Detroit v. Murray Corp.*<sup>65</sup> A subcontractor under a government contract was taxed on the value of materials and work in progress in his possession, although the federal government held title to them under the terms of the subcontract. The Justices agreed that the tax was unconstitutional since it was imposed on materials actually owned by the government on the date of assessment.<sup>66</sup>

The two Justices did not join in Whittaker's dissent in the other two cases. *United States v. City of Detroit*<sup>67</sup> and *United States v. Township of Muskegon*<sup>68</sup> concerned state taxes levied against private parties who used real property belonging to the federal government in private businesses conducted for profit. They were taxed as though they owned the property. In *City of Detroit* the corporation had leased a portion of a government owned industrial plant. In *Muskegon* the taxpayer was using the property under a permit, not a lease; the property was being used in the fulfillment of government contracts.

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63. 358 U.S. at 543-49.

64. *Id.* at 566-70 (dissenting opinion).

65. 355 U.S. 489 (1958).

66. *Id.* at 533 (dissenting opinion).

67. 355 U.S. 466 (1958).

68. 355 U.S. 484 (1958).

Whittaker argued in *City of Detroit* that there were two estates, the government's estate consisting of the entire property and the leasehold owned by the taxpayer. The state had imposed a tax on the government, he said, because it taxed the lessee as if he owned the entire estate, rather than just taxing the value of the lease, which was all that belonged to the taxpayer.<sup>69</sup> In *Muskegon* the taxpayer did not even own a leasehold that could be taxed; the entire property being taxed belonged to the government.<sup>70</sup>

Harlan joined the opinion of the Court in both cases, finding lessees' and users' taxes to be taxes on the privilege of using tax exempt property. Such taxes were constitutional. Harlan charged that the dissent "[equated] the measure of the tax with the subject of the tax."<sup>71</sup>

Frankfurter concurred. In taxing the enjoyment or use of property that was itself free from taxation the state was, he said, taxing the interest of the taxpayer, not the property of the federal government. This distinction was not lost because the measure of the tax was the same in either case.<sup>72</sup>

Frankfurter's and Harlan's willingness to support state taxation is evident in cases involving state taxes levied against corporations engaged in interstate commerce.<sup>73</sup>

Whittaker's attitude on the subject is best seen in *Northwestern States Portland Cement Co. v. Minnesota*.<sup>74</sup> The case concerned the constitutionality of non-discriminatory state net income tax laws which levied taxes on that portion of a foreign corporation's net income earned from, and fairly apportionable to, business activities within the state when those activities were exclusively part of interstate commerce.

The majority found the taxing scheme to be consistent with precedents. States already were free to impose a nondiscriminatory net income tax on a corporation engaged in *both*

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69. 355 U.S. at 481-83 (dissenting opinion).

70. 355 U.S. at 488 (dissenting opinion).

71. 355 U.S. at 506.

72. *Id.* at 502-03.

73. See *Scripto v. Carson*, 362 U.S. 207 (1960), and *R.E.A. v. Virginia*, 358 U.S. 434 (1959). In *R.E.A.* they concurred with a franchise tax measured by gross receipts derived from transportation within Virginia of goods being moved in interstate commerce. In *Scripto*, Florida levied a use tax against a foreign corporation which had failed to collect the use tax from its Florida customers as required by state law. Harlan joined the majority and Frankfurter concurred in a finding that the requirement did not place a burden on interstate commerce. Whittaker dissented in both.

74. 358 U.S. 450 (1959).

interstate and intrastate commerce, taxing the intrastate income. To permit the state within which a corporation engaged solely in interstate commerce to tax the net income derived from that state on a properly apportioned basis in no way regulated or increased the burden on interstate commerce.<sup>75</sup>

Whittaker strongly disagreed. He maintained that the fact that the tax could be fairly apportioned was of no legal consequence. The income being taxed was derived exclusively from interstate commerce. Direct taxation of pure interstate commerce was substantial regulation of such commerce. The commerce clause<sup>76</sup> denied the states power to regulate interstate commerce. The state laws, as far as Whittaker was concerned, were unconstitutional; the majority holding was a break with precedents.<sup>77</sup>

*Federal Taxes.* In cases involving disputes between the individual and the Internal Revenue Service, Whittaker was more inclined to support the claims of the taxpayer than were Frankfurter and Harlan. This is seen, for instance, in *Commissioner v. Acker*.<sup>78</sup> Acker failed to file estimated tax returns for the years 1947-1950, in violation of section 58 of the Internal Revenue Code of 1939.<sup>79</sup> Failure to file the declaration subjected him to payment of a penalty prescribed by section 294(d)(1)(A).<sup>80</sup> The Internal Revenue Service also imposed a further penalty under section 294(d)(2),<sup>81</sup> claiming that his failure to file an estimated tax declaration amounted to a substantial underestimation of his tax.

Whittaker, writing for the Court, disagreed. He categorized section 294(d)(2) as a penalty. A person was not subject to a penalty under proper statutory construction unless the words of the statute plainly imposed it. He was unable to find any language in the statute that authorized the treatment of a

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75. *Id.* at 463-65, 469 (Harlan, J., concurring).

76. U.S. CONST. art. I, § 8, cl. 3.

77. 358 U.S. at 496-97 (dissenting opinion).

78. 361 U.S. 87 (1959).

79. Int. Rev. Code of 1939, ch. 1, § 58, 53 Stat. 32 (now I.R.C. § 6015(d)) required a taxpayer to file a yearly declaration of estimated tax if his gross income from wages or other sources was expected to exceed specified amounts. Among other things, he had to state the estimated tax owed and the estimated credits against this tax.

80. Int. Rev. Act of 1943, ch. 63, § 118(a), 58 Stat. 37 (now I.R.C. § § 6651, 6654) required specified charges assessed in case of failure to make and file a declaration of estimated tax.

81. Int. Rev. Act of 1943, ch. 63, § 118(a), 58 Stat. 37 (now I.R.C. § 6654) added a charge for substantial underestimation of estimated tax if 80% of the tax actually owed exceeded the total amount of the estimated tax.

taxpayer's failure to file a declaration of estimated tax as the equivalent of a declaration estimating no tax.<sup>82</sup>

Frankfurter, with the concurrence of Clark and Harlan, dissented. He argued that section 294(d)(2) was not a penalty but an interest charge, designed to compensate the Treasury for delay in the receipt of funds that a reasonably accurate estimate would have shown were due and owing.<sup>83</sup> The Court, he said, should follow the legislative report on the meaning of the statutes; Congress intended failure to file a declaration when due to be the equivalent of a statement that the amount of estimated tax owed was zero.<sup>84</sup>

Although Whittaker's disagreement with Frankfurter and Harlan in the taxation cases is documented it does not seem to present or prove any basic philosophical difference between the Justices. It is consistent with his conservative leanings against governmental powers.

### *Criminal Law and Procedure*

In the area of criminal law and criminal procedure, however, Whittaker, often without explanation, joined the liberal position. His vote was crucial, for instance, in *Moore v. Michigan*,<sup>85</sup> a five-four decision ordering a new trial for a seventeen-year-old black with a seventh grade education and a history of head injuries. The youth had pleaded guilty to a charge of murder without benefit of counsel. The majority concluded there was no showing of a willing or meaningful waiver of the right to counsel.

His vote was also decisive in *Green v. United States*,<sup>86</sup> another five-four decision. The defendant had been tried for first-degree murder but the jury had found him guilty of only second-degree murder. The Court ruled he could not be retried on the more serious charge if a new trial were ordered as that would place him in double jeopardy.

Whittaker took a restrictive position in other cases, such as those involving coerced or involuntary confessions. In *Reck v. Pate*,<sup>87</sup> for example, the petitioner claimed he had been de-

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82. 361 U.S. at 91.

83. *Id.* at 95 n.1 (dissenting opinion).

84. *Id.* at 94-96.

85. 355 U.S. 155 (1957).

86. 355 U.S. 184 (1957).

87. 367 U.S. 433 (1961).



nied due process under the fourteenth amendment<sup>88</sup> by the admission into evidence at his murder trial of an allegedly coerced confession. Reck was a nineteen-year-old of subnormal intelligence. After he had been held incommunicado several days and subjected to long stretches of interrogation he was confronted with confessions made by his companions. Physically weakened and in pain, he confessed to the murder.

Frankfurter and Harlan joined in Stewart's majority opinion, holding that the confession was coerced and its admission as evidence violative of due process.<sup>89</sup> Whittaker joined Clark in dissent; they protested the Court's overturning "so many decisions by so many judges, both state and federal, entirely upon psychological grounds."<sup>90</sup>

Whittaker also joined the more liberal justices in cases involving questions of criminal procedure. The decisions in these cases were beneficial to the individual rather than the government. Frankfurter and Harlan usually dissented.<sup>91</sup> This pattern is seen, for example, in *Lott v. United States*,<sup>92</sup> a five-four opinion written by Whittaker.

The defendants in *Lott* were prosecuted for attempting and conspiring to evade payment of income tax owed by their corporate employer. The district court accepted pleas of *nolo contendere* on behalf of some of the defendants on March 17, 1959. The court decided to postpone pronouncement of judgment until conclusion of the impending jury trials of two other defendants. On June 19 the court orally pronounced judgment and sentenced the defendants. Three days later a formal judgment was filed. June 13 defendants filed motions in arrest of judgment. Upon denial of those motions they filed notices of appeal on July 15 and 17. The Court of Appeals dismissed their appeals as untimely, stating under Federal Rule of Criminal Procedure 34<sup>93</sup> the defendants' pleas of *nolo contendere* had constituted a "determination of guilt."<sup>94</sup>

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88. U.S. CONST. amend. XIV, § 1, reads in part "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

89. 367 U.S. at 441-44.

90. *Id.* at 455 (dissenting opinion). See also *Columbe v. Connecticut*, 367 U.S. 568 (1961).

91. See, e.g., *Travis v. United States*, 364 U.S. 631 (1961), *Burns v. Ohio*, 360 U.S. 252 (1959), and *Smith v. United States*, 360 U.S. 1 (1959).

92. 367 U.S. 421 (1961).

93. Federal Rule of Criminal Procedure 34 required a motion in arrest of judgment be made five days "after determination of guilt."

94. 367 U.S. at 423-24.

In his majority opinion Whittaker started with the proposition that a plea of *nolo contendere* was the same as an admission of guilt. However, a plea or admission did not constitute conviction or a determination of guilt. Therefore, it did not dispose of the case and could be withdrawn, with the consent of the court, at any time before the court rendered its pronouncement of judgment imposing a sentence. Thus, he concluded, it was the judgment of conviction and sentence, not the tender and acceptance of the plea of *nolo contendere* that constituted the "determination of guilt" under Rule 34. Consequently the appeals were timely.<sup>95</sup>

Frankfurter, Harlan, and Stewart joined Clark's dissent. They argued the acceptance of the pleas of *nolo contendere* was the "determination of guilt." The court had nothing more to do after accepting a plea of *nolo contendere* than it did after accepting a guilty plea or after a jury had returned a verdict of guilty. Until such time as the court granted a motion to withdraw the plea the effect was identical. The minority charged the Court's decision had enlarged the time provided in the Rules for taking action.<sup>96</sup>

The three Justices again showed a difference in approach in several companion cases considering the validity of peacetime court-martial trials of civilians accompanying the armed forces overseas. Article 2(11) of the Uniform Code of Military Justice<sup>97</sup> extended jurisdiction of the court-martial to persons employed by, or accompanying, the armed forces outside the United States.<sup>98</sup>

*Kinsella v. United States ex rel. Singleton*<sup>99</sup> raised the issue of the applicability of Article 2(11) to civilian dependents charged with noncapital offenses. Similar questions concerning civilian employees who had committed capital or noncapital

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95. *Id.* at 426.

96. *Id.* at 431-32.

97. 10 U.S.C. § 802(11) (1958).

98. The Court previously had considered the applicability of Article 2(11) to a civilian dependent who had committed a capital offense while accompanying the armed forces overseas in peacetime in *Reid v. Covert*, 354 U.S. 1 (1957). It decided that any power to try civilians had to be found solely in article I, § 8, clause 14, granting Congress the power "to make rules for the government and regulation of the land and naval forces." The test for jurisdiction was one of "status", *i.e.*, whether the accused in a court-martial proceeding fell within the term "land and naval forces." Constitutional considerations required this term to be read in a restrictive manner. The Court held civilian dependents charged with capital offenses could not be tried by court-martial in peacetime.

99. 361 U.S. 234 (1960).

offenses were raised in *Grisham v. Hagan*<sup>100</sup> and *McElroy v. United States ex rel. Guagliardo*.<sup>101</sup>

The majority held that prosecution and conviction by court-martial of civilian dependents or employees was constitutionally impermissible. Whether the crime charged was capital or noncapital, such persons were guaranteed normal jury trials under article III<sup>102</sup> and the fifth<sup>103</sup> and sixth<sup>104</sup> amendments to the Constitution.<sup>105</sup>

Harlan, joined by Frankfurter, maintained that civilian employees and dependents properly came under military jurisdiction in noncapital cases.<sup>106</sup> He argued congressional power to regulate the land and naval forces was to be read in light of the necessary and proper clause.<sup>107</sup> "The true issue was whether or not the relationship between the person affected and the military establishment was 'close enough so that Congress may . . . deem it 'necessary' that the military be given jurisdiction to deal with offenses committed by such a person.'"<sup>108</sup> Harlan found the necessary relationship existed as to both employees and dependents. He concluded that military justice was nonetheless improper in capital cases, whose "awesome finality" weighed heavily against denial of "the special procedural safeguards which have been thrown around those charged with such crimes."<sup>109</sup>

Whittaker, writing for himself and Stewart, agreed that there was no constitutional distinction between capital and noncapital cases as regards civilian dependents accompanying the armed forces. They were not subject to court-martial.<sup>110</sup> He found, however, a "marked and clear difference" between those dependents and civilian employees.

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100. 361 U.S. 278 (1960).

101. 361 U.S. 281 (1960).

102. U.S. CONST. art. III, § 2, cl. 3, provided "the trial of all Crimes . . . shall be by Jury . . . ."

103. *Id.* amend. V states: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ."

104. *Id.* amend. VI, requires that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury . . . ."

105. 361 U.S. at 247-49; 361 U.S. at 280; 361 U.S. at 283-84.

106. 361 U.S. at 250.

107. U.S. CONST. art. I, § 8, cl. 18, gave Congress the power "[t]o make all laws which shall be necessary and proper for carrying into Execution the [enumerated] Powers . . . ."

108. 361 U.S. at 257.

109. *Id.* at 255.

110. *Id.* at 263-64.

[Civilian employees] are so intertwined with those forces and military communities as to be in every practical sense an integral part of them. On the other hand, civilian dependents "accompanying the armed forces" perform no services for those forces, present dissimilar security and disciplinary problems, have only a few of the military privileges, and generally stand in a very different relationship to those forces than the civilian employee.<sup>111</sup>

Based on this and the historical pattern of military jurisdiction over such civilians, he concluded that civilian employees of the armed forces could be tried by court-martial for capital or non-capital offenses.<sup>112</sup>

Overall, there does not appear to be any pattern to the disagreement in the criminal law area.<sup>113</sup> Although there were a number of cases in the area where Whittaker joined the liberal bloc, "[f]or the most part . . . Whittaker voted for the liberal position in cases of clear individual injustice where the decisions had extremely limited application and the emotional appeal of the case was particularly strong."<sup>114</sup> His liberal votes were not due to a major shift in outlook.

#### *Other Categories of Disagreement*

The other categories of cases classified in this study produced similar results. That is, although the so-called conservative Justices on the Supreme Court during Whittaker's tenure did not vote as a bloc, the disagreements among them fail to produce a pattern reflecting basic philosophical differences. That being the case, it is difficult to clearly define the judicial philosophy of Justice Whittaker.

*Government Regulation.* In this area Whittaker was more inclined than Frankfurter or Harlan to find the arguments on behalf of the regulation or agency under consideration unpersuasive. The cases in the area, however, cover a variety of subjects and are illustrative only of general attitudes.<sup>115</sup> Whittaker

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111. *Id.* at 265.

112. *Id.* at 266-76.

113. See app. A, *infra*.

114. Friedman, *supra* note 6, at 2897.

115. For example, *Boynton v. Virginia*, 364 U.S. 454 (1960), considered whether racial discrimination in services within a bus terminal restaurant was barred by the Interstate Commerce Act. The majority found the restaurant an integral part of the carrier's transportation service for interstate passengers; thus racial discrimination was barred by the Act. Whittaker dissented, maintaining the restaurant was not even indirectly operated or controlled by the carriers.

opposed decisions of the ICC in several cases. His reasons usually were either that the evidence was insufficient to support the ICC's findings<sup>116</sup> or that the commission had failed to adequately and correctly apply the regulations and standards for issuing certificates of public convenience and necessity to carriers.<sup>117</sup>

*Civil Procedure.* Whittaker disagreed with both Frankfurter and Harlan in most of the cases in this area.<sup>118</sup> Whittaker's attitude on venue was narrower than those of Frankfurter and Harlan, calling for considerable restrictions on available places for bringing suit. This restrictive approach is typical of many of his decisions in civil procedure cases. For example, Whittaker wrote for the Court in *Hoffman v. Blaski*;<sup>119</sup> the decision holding that section 1404(a),<sup>120</sup> the change of venue statute, did not authorize the transfer of an action to any district in which the plaintiff could not have brought the action originally. This gave the narrowest possible scope to the opera-

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Campbell v. Hussey, 368 U.S. 297, *rehearing denied*, 368 U.S. 1005 (1961), on the other hand, concerned the effect of the Tobacco Inspection Act on the state of Georgia's tobacco identification law. The majority found federal legislation had pre-empted the area. Whittaker concurred in the result without any explanation, while Frankfurter and Harlan argued that there was no pre-emption.

Whittaker was the sole dissenter in *American Trucking Ass'n v. Frisco Transp. Co.*, 358 U.S. 133 (1958). The Interstate Commerce Commission had failed to include a limiting condition in the certificate of public necessity and convenience issued to a trucking service. The Court approved the Commission's correction of the certificate on the ground that the omission was inadvertent. Whittaker, without explanation, stated that the evidence was insufficient to support a finding of mere inadvertent clerical error.

116. See also *United States v. Drum*, 368 U.S. 370 (1961), where he dissented with Harlan.

117. See *ICC v. J-T Transp. Co.*, 368 U.S. 81 (1961) (Frankfurter, J., joined by Harlan, J., and Stewart, J., concurring and dissenting); *Schaffer Transp. Co. v. United States*, 355 U.S. 83 (1957) (Frankfurter, J., dissenting); *Pan-Atlantic S.S. Co. v. Atlantic Coast Line R.R.*, 353 U.S. 436 (1957) (Burton, J., joined by Harlan, J., and Whittaker J., dissenting).

118. See app. A, *infra*.

119. 363 U.S. 335 (1960). The defendants in a patent infringement action moved to transfer the action from the district court in Texas to the district court in Illinois. The Texas court granted the motion over plaintiff's objections. The Court of Appeals for the Fifth Circuit denied plaintiff's motion for writ of mandamus vacating the transfer order. Plaintiff then filed a motion in the Illinois court for an order remanding the action to the Texas court on the ground that the Texas court did not have the power to make the transfer order. Although this motion was denied, the Court of Appeals for the Seventh Circuit subsequently granted the plaintiff's petition for a writ of mandamus directing the Illinois district court to vacate its order.

120. 28 U.S.C. § 1404(a) (1976) provides "for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

tion of section 1404(a). It was immaterial that the defendant subsequently waived any objection to venue in some other forum. The determining situation was the one which existed at the time plaintiff instituted the suit.<sup>121</sup> Frankfurter and Harlan dissented, perceiving the problem as one of effective judicial administration.<sup>122</sup>

*Political Freedom and Citizenship.* Again, the reasons for disagreement between the three justices are often unclear. Many times they disagreed only on whether the government had met its burden of proof.<sup>123</sup> Additionally, Whittaker joined the liberal bloc only in decisions of narrow applicability, such as in single instances of deportation<sup>124</sup> or denationalization.<sup>125</sup>

*Constitutional Issues.* Similarly, cases involving questions of full faith and credit, the "taking" of property, and the first amendment<sup>126</sup> did not seem to illustrate basic philosophical differences between Justice Whittaker and Justices Frankfurter and Harlan. *Staub v. City of Baxley*,<sup>127</sup> for example, involved the first amendment rights of a union organizer who had not obtained a permit to solicit membership under the municipal ordinance. Whittaker's opinion held that the ordinance was a prior restraint on free speech,<sup>128</sup> but his disagreement with Frankfurter was over the issue of independent state grounds.<sup>129</sup>

#### APPRAISAL OF JUSTICE WHITTAKER

At the time of his appointment, Justice Whittaker received wide and nearly universal acceptance and support. Few of the newspapers or magazines were critical.<sup>130</sup> Yet today he has been rated in such harsh terms as "a major disappointment

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121. 363 U.S. at 343-44.

122. *Id.* at 347-48 (dissenting opinion).

123. See *Maisenberg v. United States*, 356 U.S. 670 (1958); *Nowak v. United States*, 356 U.S. 660 (1958); *Nishikawa v. Dulles*, 356 U.S. 129 (1958); *Chaunt v. United States*, 364 U.S. 350 (1960). Whittaker was inclined to find the government had proven violation of the statutes involved.

124. *Bonnetti v. Rogers*, 356 U.S. 691 (1958).

125. *Trop v. Dulles*, 356 U.S. 86, and *Perez v. Brownell*, 356 U.S. 44 (1958).

126. U.S. CONST. amend. I reads in part "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

127. 355 U.S. 313 (1958).

128. *Id.* at 325.

129. *Id.* at 320, dissenting opinion at 329.

130. J. Ashby, *Supreme Court Appointments Since 1937*, at 263 (1972) (published dissertation, University of Notre Dame).

on the bench"<sup>131</sup> and "near the bottom in terms of Court performance."<sup>132</sup>

Certainly there was no lack of hard work. Whittaker felt "[j]ustice . . . in the main is . . . the product of long hours of hard, diligent, painstaking labor by highly competent, experienced, careful and practical lawyers."<sup>133</sup> Testimony of his fellow Justices indicates that Whittaker tried to follow this idea. Chief Justice Warren stated: "His entire preoccupation was with the law. He refused to leave time for any diversion."<sup>134</sup> Justice Douglas indicated Whittaker processed every case "with a thoroughness never exceeded."<sup>135</sup> "Justice Whittaker," according to Justice Harlan, "was a prodigious worker who was satisfied with nothing less than full mastery of every record and brief."<sup>136</sup>

The main criticism of Whittaker is that he "made decisions, but . . . enunciated no doctrine; he [took] positions, but he . . . embraced no philosophy."<sup>137</sup> Warren commented that Whittaker's "opinions on a variety of subjects [would] be read . . . for their thoroughness and for the convictions expressed."<sup>138</sup> Whittaker himself said he read the law only for an understanding of its meaning, and then applied and enforced it according to his understanding.<sup>139</sup> He stated he was not conscious of having any political leanings or philosophy.<sup>140</sup>

The observation has been made that "[a] man who is not conscious of any leanings is a man who has all the conventional leanings of his time, class, and calling."<sup>141</sup> Whittaker had the conservative political, social and economic outlook one might expect from a highly successful corporate lawyer from the mid-United States.<sup>142</sup>

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131. ABRAHAM, *supra* note 12, at 247.

132. *Id.* at 235.

133. TIME, March 11, 1957, at 17.

134. Charles Evans Whittaker—the Supreme Court Years, 40 TEX. L. REV. 744, 744 (1962).

135. *Id.* at 745.

136. *Id.* at 748.

137. D. Berman, *Mr. Justice Whittaker: A Preliminary Appraisal*, 24 MO. L. REV. 1, 14 (1959).

138. Charles Evans Whittaker—the Supreme Court Years, *supra* note 134, at 744.

139. LIFE, July 1, 1957, at 36.

140. Berman, *supra* note 137 at 16 (quoting the *Kansas City Star*, March 3, 1957, at 15).

141. Friedman, *supra* note 6, at 2896.

142. KATCHER, *supra* note 20, at 427.

## CONCLUSION

Although close study shows that in many cases Whittaker disagreed with Frankfurter and Harlan, his colleagues in the conservative bloc, much of the time he joined them, taking a conservative position. Many of the disagreements among these Justices involved labor relations, government regulation or taxation. These were all areas with which, as a corporate lawyer, Whittaker probably was most familiar. In all of these areas Whittaker usually took the more conservative position. He was more inclined to join the liberal Justices in questions of criminal law and procedure or political freedom and citizenship. However, the cases examined do not show any major basic philosophical differences between Whittaker and Frankfurter or Harlan.

Although "[f]ive years on the Supreme Court is not sufficient time for [Whittaker] to make known through his opinions his entire philosophy of law and justice,"<sup>143</sup> it is long enough for him to express any major differences in opinion between himself and those with whom he normally agreed. That he did not do so is indicative of disagreement based primarily on a differing interpretation of the facts in individual cases and a conservative position based mainly on unarticulated instinct rather than a developed philosophy.<sup>144</sup>

*Barbara B. Christensen*

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143. *Charles Evans Whittaker—the Supreme Court Years*, *supra* note 134, at 744.

144. Friedman, *supra* note 6, at 2903.



## APPENDIX A

Type of Case	Total Cases	Opinions Written by Whittaker			Instances of Disagreement with		
		Maj.	Concur.	Dissent.	Frankfurter only	Harlan only	Both
Labor Relations	26	1	3	13	6*	12	8
Government Regulation	19	0	1	2	7	3	9
Taxation	22	2	1	9	4	5	13
Civil Procedure	11	5	1	1	1	1	9
Criminal Law and Procedure	22	3	2	2	3**	2	17
Political Freedom and Citizenship	12	1	0	1	3	2	7
Constitutional Issues	12	1	0	1	4	3	5
Patent	1	1	0	0	0	0	1
Admiralty	2	0	0	1	1	0	1
Total	127	14	8	31	29	28	70

\*Frankfurter did not participate in 5 cases.

\*\*Frankfurter did not participate in 1 case.